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Supreme Court of the United States

October Term, 1974

No. 74-64

MARIE ABATE, *et al.*,
Petitioners,

vs.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,
Respondents.

REPLY BRIEF OF PLAINTIFFS-APPELLEES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BALZARINI, WALSH, CONWAY & MAURIZI,
J. M. MAURIZI, ESQUIRE,
JOSEPH W. CONWAY, ESQUIRE,
3303 Grant Building,
Pittsburgh, Pennsylvania 15219,
Attorneys for Plaintiffs-Appellees.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON—SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7469

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Counter-Statement of the Case

Plaintiffs submit that only three assertions contained in the objecting plaintiffs' Petition require comment, *i.e.*,

(a) That the Third Circuit Court of Appeals decision in this case is "in direct conflict" with the case of *Air Line Stewards v. American Airlines, Inc.*, 490 F2d 636 (7th Circuit, 1973), *cert. denied sub-nom., Air Line Stewards v. Zipes*, ____ U.S. ____ (1974) ("*Airline* cases");

(b) That Rule 23 affords the objecting plaintiffs an opportunity to opt out of the court-approved *settlement* through the creation and maintenance of sub-classes; and

(c) That the notice to the class was insufficient in that it "made no mention of their on-going settlement negotiations and failed to suggest that plaintiffs would be bound by the results of a court approved settlement, as well as a judgment".[1]

From a factual standpoint, discussion of these matters requires only that the Court be appraised of the fact that there were no "on-going settlement negotiations" at the time that the notices to the class were sent on or about July 31, 1972 and November 28, 1972 and that any assertion to the contrary has no basis in fact.[2]

The record itself lends no support to, and the undisputed facts absolutely contradicted, this assertion. As the objecting plaintiffs themselves state in their Petition, plaintiffs presented the liability aspects of their case in November, 1972 and defendant, Pittsburgh Plate Glass Company, began presentation of its liability defense on December 21, 1972. Subsequent to December 21, 1972, defendant, Pittsburgh Plate Glass Company, made a settlement offer to plaintiffs' counsel. Plaintiffs' counsel in turn convened a meeting of the class members on January 3, 1973 to discuss the terms of the settlement offer. A substantial majority of members of the class who attended this meeting voted to accept the settlement offer. On the basis of this vote in favor of accepting the offer, plaintiffs' counsel in his capacity as attorney for the class recommended that the District Court approve the settlement.

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[1] Petition, Page 22, Footnote 27.

[2] These notices were sent to every member of the class pursuant to Rule 23(c)(2). The form of the notice complied with the requirements of sub-paragraphs (A), (B) and (C) of said Rule.

ARGUMENT

The Third Circuit Court of Appeals properly entered judgment affirming the action of the District Court in approving the settlement. Further, there is no conflict in decisions rendered by the federal appellate courts or any important or substantial question of federal law which would merit review by the Supreme Court.

I. Conflict in Decisions

There is absolutely no merit in objecting plaintiffs' contention that the decision in the *Airline* cases is in conflict with the decision in this case.

In this case there is no legal or factual bases for dividing this class into sub-classes. All the factual and legal issues involved in this case are common to all members of the class. All members of the class (a) were employed by the same corporate defendant at the same plant, (b) were subject to the same collective bargaining agreement between corporate defendant and union defendant, (c) were subjected to the same illegal and discriminatory employment practices of corporate defendant and union defendant and (d) under the provisions of the approved settlement were entitled to the same benefits determined upon the bases of actual work experience as the controlling factor. The only differentiating element between plaintiff-appellees and objecting plaintiffs is that the former group is satisfied with the settlement and the latter group is dissatisfied with the settlement.

No citation of authority is necessary to support the proposition that such a difference between the groups is not legally sufficient to require the creation and maintenance of sub-classes under Rule 23 (c) (4). Additional irrefutable evidence of the fact there is no appropriate subclass in this case is shown by the fact that there are

plaintiff-appellees who accept the settlement proposal in every seniority category in which there are objecting plaintiffs. Objecting plaintiffs' assertion that this class has, like the classes in the *Airline* cases, "subdivided along the lines of the relief sought"[3] is simply not true.

On the other hand, in the *Airline* cases there were two clearly defined sub-classes with conflicting interests under the settlement approved by the District Court. A group of stewardesses filed suit against American Airlines charging that its practice of permanently discharging them because of pregnancy constituted unlawful sex discrimination; they purported to represent all persons similarly situated who had been permanently discharged for the same reason since the effective date of the Civil Rights Act of 1964. On the same day, the stewardesses' union filed a similar suit against TWA. Subsequent to the filing of these suits, the airlines agreed to terminate prospectively the illegal practice. Under the terms of a court-approved settlement, in which the union purported to represent plaintiffs in both actions, the discharged stewardesses were to be rehired with their seniority at the date of termination, but only to fill vacancies as they occurred rather than being reinstated with full back pay and interim seniority in place of stewardesses then employed with junior seniority. The Circuit Court found that these two groups had adverse, conflicting interests and that the union was not an adequate representative of the discharged stewardesses.

Plaintiffs' counsel in the *Airline* cases, Mr. Feldman, was also general counsel for the union. He undertook to represent both groups of stewardesses, *i.e.*, those stewardesses whose employment had been terminated and those stewardesses who were then actively employed by the

[3] Petition, Page 22.

airlines, in the preparation and settlement of the lawsuits. Feldman later conceded that these two groups had conflicting interests; thus neither group was an adequate representative for the other group. In negotiating the settlement proposal, Feldman consulted none of the plaintiffs or class members respecting the terms of the settlement. After the settlement proposal was formulated, the Court determined that a class action could be maintained and notice of a hearing on the terms of the proposal was sent to all class members. *At no time* were any class members given the opportunity to opt out of the action, even though the District Court held that the settlement proposal was binding on all members of the class.

Of course, the facts in this case in no way resemble the facts in the *Airline* cases and the decisions in them in no way conflict with one another. The class members in this case were given two clear, separate and distinct opportunities to opt out of the action. Such opportunities came approximately four (4) months apart, giving the members more than sufficient time to ponder and reflect on their failure to opt out of the class action the first time they were given the opportunity. Objecting plaintiffs thus must be held to have made two affirmative decisions to be included in the class by their failure to make known their desire to be excluded from the class. Further, not only were the class members in this case informed and appraised of the terms of the settlement proposal, but plaintiffs' counsel did not proceed to seek approval of the settlement proposal until a majority of the class members who voted so directed him.

Thus, there is no basis for asserting a conflict in the decisions of the Third Circuit Court in this case and the Seventh Circuit Court in the *Airline* cases.

II. "Opt Out" Opportunity

Rule 23 (c) (2) (B) requires that the class determination notice advise each member of the class that "the *judgment*, whether favorable or not, will include all members who do not request exclusion; . . ." The two notices sent to the class members in July and November, 1972 contained this language as required by the Rule. There is no requirement under Rule 23 or the case law interpreting the same that the words "*or settlement*" be inserted after the word "judgment" in subsection (c) (2) (B), for the insertion of such words would be superfluous in view of fact that any settlement must be approved by the District Court. All class members in this case were given two opportunities to opt out of the class action and, indeed, of the original 453 class members, 81 did, in fact, opt out. Objecting plaintiffs should not be given a third opportunity to opt out when Rule 23 only mandates one.

Objecting plaintiffs would have this Court rewrite Rule 23 (c) (2) (B) to enable class members to opt out of class action litigation at anytime they saw fit. If class members were able to do so, there would be no settlement in class action litigation because any class member dissatisfied with the terms of a proposal settlement could force the parties to try the case to a final judgment. If by a settlement a defendant could not terminate once and for all his liability and the expenditure of funds in defense of a class action, there would be no reason to settle with any class member.

With these facts in mind, it becomes clear that objecting plaintiffs have made an erroneous statement of the issue involved in this case. They would have the Court believe the issue to be:

> May a private litigant be compelled to settle his cause of action on terms he does not favor, merely because

> the majority of his fellow class members wish to accept the settlement?[4]

A proper statement of the issue involved in objecting plaintiffs' Petition is:

> May class members, who have had and failed to take advantage of two separate and distinct opportunities to opt out of a class action properly certified under Rule 23 (b) (3), be permitted to opt out of the action merely because they are dissatisfied with the terms and conditions of a settlement which was approved by a majority of the class members and by the District Court?

The answer to the issue is clearly in the negative and, accordingly, objecting plaintiffs' writ should be dismissed as being without merit.

Conclusion

For the above-stated reasons it respectfully submitted that the Petition for Writ Of Certiorari To The United States Court of Appeals For The Third Circuit should be denied.

Respectfully submitted,

J. M. MAURIZI, ESQUIRE,
JOSEPH W. CONWAY, ESQUIRE,
BALZARINI, WALSH, CONWAY & MAURIZI,
3303 Grant Building,
Pittsburgh, Pennsylvania 15219,

Attorneys for Plaintiffs-Appellees.

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[4] Petition, Page 9.

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SCOTT F. ZIMMERMAN
WALTER P. DeFOREST
JOHN M. MAZUR

REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Respondent,
Pittsburgh Plate Glass Company

Of Counsel:

NICHOLAS R. CRISS, JR.
PPG INDUSTRIES, INC.
Pittsburgh, Pennsylvania 15222

Financial Press Corporation, Pittsburgh

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